

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GATEWAY, INC. and GATEWAY
COMPANIES, INC.,

Plaintiff,

1:07cv6732 (CM)
ECF Case

vs.

ACS COMMERCIAL SOLUTIONS, INC.

Defendant.

**DEFENDANT ACS COMMERCIAL SOLUTIONS, INC.'S
MOTION TO DISMISS AND MOTION TO STRIKE**

Defendant ACS Commercial Solutions, Inc. (“ACS”), through undersigned counsel, moves pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss with prejudice the state law negligence and breach of contract claims of Plaintiffs Gateway, Inc. and Gateway Companies, Inc. (collectively “Gateway”). As demonstrated in the accompanying Memorandum of Law, Gateway’s state law claims are preempted by the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. §1001, *et seq.* Further, ACS moves pursuant to Rule 12(f) of the Federal Rules of Civil Procedure to strike Gateway’s demand for a jury trial.

Gateway’s state law claims against ACS should be dismissed because they are preempted by ERISA. Each of Gateway claims against ACS, including Gateway’s separate claim under ERISA, are related to ACS’s administration of benefits under the Gateway Health Plan – an ERISA covered employee welfare benefit plan. Thus, Gateway’s state law negligence and breach of contract claims fall within ERISA’s

preemptive reach and should be dismissed. Consequently, Gateway is not entitled to a jury trial.

WHEREFORE, for the reasons set forth more fully in the accompanying Memorandum of Law, which is incorporated herein by reference, ACS respectfully requests that the Court grant this motion and dismiss Gateway's state law negligence and breach of contract claims against ACS with prejudice. ACS further requests that the Court strike Gateway's demand for a jury trial.

Dated January 31, 2008

Respectfully submitted,

/s/Kevin J. Pflug

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